
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of Closed Captioning and Video)
Description of Video Programming)
Implementation of Section 305 of the)
Telecommunications Act of 1996)
Video Programming Accessibility)

MM Docket No. 95-176

**COMMENTS OF BELL SOUTH CORPORATION,
BELL SOUTH INTERACTIVE MEDIA SERVICES, INC. AND
BELL SOUTH WIRELESS CABLE, INC.**

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BellSouth Corporation and its subsidiaries BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (collectively referred to herein as "BellSouth") hereby submit their comments in response to the *Notice of Proposed Rulemaking* ("NPRM") issued in the above-captioned proceeding.¹

I. EXECUTIVE SUMMARY.

BellSouth currently provides or plans to provide multichannel video programming services via franchised cable systems and wireless cable systems throughout portions of the southeastern United States. Accordingly, BellSouth has a substantial interest in the Commission's implementation of the closed captioning provisions of the Telecommunications Act of 1996 (the "1996 Act").

¹FCC 97-4 (rel. January 17, 1997).

BellSouth supports the Commission's attempt to craft rules that will maximize access to multichannel video programming by hearing-impaired viewers. BellSouth has made a firm commitment to equip its cable and wireless cable systems with the necessary technology to retransmit all closed captioned programming intact. That commitment is consistent with the basic goals of the *NPRM*. BellSouth believes, however, that the public policy objectives of the 1996 Act will best be served by assigning responsibility for captioning to those parties best positioned to ensure that the maximum amount of programming is captioned for as wide an audience as possible.

At the heart of BellSouth's position is recognition of the basic fact that it is more economical and efficient to caption programming at the time of production than to have each multichannel video programming distributor ("MVPD") caption the programming just before it is delivered to the subscriber. BellSouth therefore submits that the Commission should impose responsibility for creation and insertion of captioning on program owners and not on MVPDs whose only role in the distribution "chain" is to retransmit captions to subscribers intact. The Commission's assumptions about an MVPD's ability to reject non-captioned programming are incorrect and thus do not support imposing the captioning obligation on cable and wireless cable systems. Furthermore, as a practical matter, it is simply unworkable to require every MVPD in the United States to incur duplicative equipment, labor and administrative costs to ensure that closed captioning is provided for potentially thousands of programs over multiple channels. This type of regulatory scheme would cause exactly the type of financial burden on the cable and

wireless cable industries which Congress sought to avoid in enacting the closed captioning provisions of the 1996 Act.

The problems inherent in captioning programming at the MVPD level also highlight the fact that the consumer ultimately bears the cost of captioning, regardless of who has the responsibility for captioning under the Commission's Rules. The Commission has already observed that the financial burden of captioning is relatively low when it is inserted at the source and distributed to a large audience. By contrast, the cost of captioning to the consumer increases to the extent that the captioning obligation is imposed further up in the distribution chain, and is at its highest if the obligation is imposed on an MVPD, since the cost cannot be amortized over as large a number of viewers.

BellSouth further requests that the Commission exclude ITFS licensees from the definition of "video programming providers" and adopt exemptions from its closed captioning rules for ITFS and public, educational or governmental ("PEG") access programming. As set forth in the contemporaneous comments filed in this proceeding by The Wireless Cable Association International, Inc., ITFS licensees provide educational programming to local students that is not intended for the general public. Moreover, absent an exemption, wireless cable operators in many cases would have to block any ITFS programming that does not comply with the Commission's captioning requirements. This would *decrease* the availability of ITFS programming and thus would not serve the public interest.

Further, the Commission has already concluded that the financial cost of closed captioning would be an excessive burden on public access programmers, many of whom are local citizens who produce community-based programs on a non-profit basis. This is equally true of educational and governmental access programming. Since the establishment and use of PEG channels is a matter of negotiation between cable operators and local franchising authorities, BellSouth submits that the closed captioning of PEG access programming is a matter which should be handled during the cable franchising process.

Finally, for the reasons set forth herein, BellSouth submits that (1) the Commission's existing technical standards for closed captioning are sufficient, and that the Commission should not adopt any non-technical standards with respect to accuracy, punctuation, etc.; (2) the Commission should not impose any record keeping requirements on MVPDs vis-a-vis closed captioning; and (3) the Commission must declare that programmers are required to make captioned programming available to all MVPDs on a nondiscriminatory basis.

II. THE OBJECTIVES OF THE 1996 ACT ARE BEST SERVED BY IMPOSING THE PRIMARY OBLIGATION FOR CREATION AND INSERTION OF CLOSED CAPTIONING ON PROGRAM OWNERS.

At the outset BellSouth wishes to emphasize that there is no issue as to the cable or wireless cable industry's ability to retransmit captioned programming intact to subscribers.²

²See, e.g., Reply Comments of Home Box Office, Inc., MM Docket 95-176, at 18 (filed April 1, 1996) ["[T]he record does not contain evidence of widespread failure on the part of redistributors to retransmit closed captioned programming sufficient to warrant the imposition of onerous regulation."].

Cable and wireless cable operators rely heavily on established program suppliers such as cable programming networks (e.g., HBO, ESPN, CNN) and broadcast signals for their programming. Cable and wireless cable systems simply retransmit that programming to their subscribers intact along with any closed captioning provided by the program owner. The cable or wireless cable subscriber in turn may view the producer-supplied closed captioning so long as he or she uses a television set or special decoder with closed captioning capability. This is a simple and economical process which has worked effectively for program owners, MVPDs and their subscribers.

Congress thus has recognized that “[I]t is clearly more efficient and economical to caption programming *at the time of production and to distribute it with captions* than to have each delivery system or local broadcaster caption the program.”³ At the heart of this observation is the

³H.R. Rep. 104-204, 104th Cong., 1st Sess. at 114 (1995) (“House Report”) [emphasis added]. The Commission has agreed, stating that “[F]rom a practical standpoint, . . . captioning is most efficiently placed at the production stage.” *NPRM* at ¶ 6. Other parties representing virtually all links of the video distribution “chain” and at least one public interest group representing the deaf have taken a similar position. See Comments of Bell Atlantic, MM Docket No. 95-176, at 6-7 (filed March 15, 1996); Comments of Home Box Office, MM Docket No. 95-176, at 12 (filed March 15, 1996); Comments of CBS Inc., MM Docket No. 95-176, at 21 (filed March 15, 1996); Comments of Capital Cities/ABC, Inc., MM Docket No. 95-176, at 11-12 (filed March 15, 1996); Comments of National Broadcasting Company, Inc., MM Docket No. 95-176, at 12 (filed March 15, 1996); Comments of the National Association of Broadcasters, MM Docket No. 95-176, at 8 (filed March 15, 1996); Joint Comments of Schwartz, Woods & Miller, MM Docket No. 95-176, at 14 (filed March 15, 1996); Comments of the Satellite Broadcasting and Communications Association, MM Docket No. 95-176, at 2 (filed March 15, 1996); Comments of EEG Enterprises, Inc., MM Docket No. 95-176, at 4-5 (filed March 15, 1996); and Comments of the Association of Late-Deafened Adults, MM Docket No. 95-176, at 4 (filed March 14, 1996).

basic fact that captioning will be inserted in the most economical manner if it is done *once* at the very beginning of the distribution process. Also, captioning is an *editorial* function insofar as it requires accurate transcription of dialogue and precise placement of captions to ensure that they appear at the right moment in the proper location on the screen. The successful completion of these functions is most easily accomplished if captioning is done by the entity that is most familiar with program content, *i.e.*, the program owner.

Accordingly, Congress did not direct the Commission to impose any captioning obligations on MVPDs, nor did it preclude the Commission from imposing captioning obligations on other entities in the distribution chain who are closer to the production stage of programming. Section 713(b)(1) of the 1996 Act merely requires the Commission to ensure that new programming is “fully accessible through the provision of closed captions,” without excluding any particular entity from the scope of the Commission’s closed captioning rules.⁴ Moreover, Section 713(b)(2) requires the Commission to ensure that “video programming providers *or owners* maximize the availability of [library] programming.”⁵

BellSouth therefore submits that the Commission’s task in this proceeding is not to merely identify the final link in the distribution chain and place the captioning obligation there. Rather, the Commission’s task is to identify that link in the chain that is best equipped to comply with the Commission’s captioning requirements and otherwise ensure that captioning will be available

⁴47 U.S.C. § 613(b)(1).

⁵47 U.S.C. § 613(b)(2).

to as many subscribers as possible. Given Congress's recognition that it is most efficient to caption programming *one time* at the production stage and distribute the programming with captions already in place, BellSouth submits that it would be most logical for the Commission to impose captioning obligations on the program producers.

In the *NPRM*, however, the Commission in effect proposes that MVPDs be solely responsible for compliance with the Commission's closed captioning rules, on the theory that such entities "are in the best position to ensure that the programming they distribute is closed captioned because of their role in the purchasing of programming from producers."⁶ The Commission also states that the "direct link" between MVPDs and their subscribers is "an important consideration," but does not explain exactly why this is the case.⁷ For the reasons set forth below, BellSouth respectfully submits that the Commission's assumptions here are incorrect, and that imposing the captioning obligation on the program producer remains the most sensible and effective way to ensure wide distribution of captioned programming via multichannel technologies.

First, MVPDs do not "purchase" programming directly from producers. Rather, MVPDs merely retransmit broadcast stations and cable networks who either produce programming themselves or purchase programming from outside producers. MVPDs thus are far removed

⁶*NPRM* at ¶ 28.

⁷*Id.*

from the production stage of television and cable network programming, and thus have no input into whether that programming is captioned.⁸

Second, an MVPD cannot force a broadcast station or a cable network to supply captions where it has already been determined that it is uneconomical or technically infeasible to do so. The reality of the marketplace is that subscribers demand certain types of programming whether it is captioned or not. Hence, it is simply not the case that an MVPD has sufficient leverage over popular television broadcast stations and cable networks to insist that programming be captioned as a precondition to carriage. This is especially true in the case of new video competitors such as "overbuild" cable systems and wireless cable, which cannot compete effectively with incumbent cable operators without unimpeded access to the most popular broadcast and cable network programming available.

Furthermore, as a legal matter all MVPDs do not have absolute control over all of their channels. For instance, under the 1984 Cable Act local franchising authorities can and usually do require cable operators to devote channel capacity to PEG access programming in which the cable operator has no involvement and which generally must be carried regardless of whether it

⁸Excluding must-carry signals, MVPDs acquire the right to retransmit broadcast and cable network programming through retransmission consent agreements (in the case of the former) and affiliation contracts (in the case of the latter). These agreements, however, only give an MVPD the right to retransmit the underlying broadcast or cable network feed; they do not give the wireless cable system any rights with respect to the television broadcast station's or cable network's programming. Moreover, in many cases these agreements do not require the broadcaster or cable network to provide captioned programming.

is captioned.⁹ The 1984 Cable Act also requires cable operators to devote up to 15% of their channels for commercial leased access by unaffiliated users; as in the case of PEG channels, a cable operator's editorial rights over leased access channels are very limited and do not permit leased access programming to be deleted solely because it is not captioned.¹⁰ And, under the 1992 Cable Act, cable operators must carry a minimum number of local television broadcast signals (including any captioning in line 21 of the vertical blanking interval) without alteration.¹¹

In addition, in most cases a wireless cable system's channel capacity includes up to 20 Instructional Television Fixed Service ("ITFS") channels which the system leases on a part-time

⁹47 U.S.C. § 531(b),(e).

¹⁰47 U.S.C. § 532 (b)(1), (c)(2); *see also Denver Area Educ. Telecom. Consortium v. FCC*, 116 S.Ct. 2374, 2394 (1996) ["When a 'leased channel' is made available by the operator to a private lessee, the lessee has total control of programming during the leased time slot."] [*Denver Ed.*"]. The Supreme Court has stated that a cable operator may screen leased access programming that is patently offensive or indecent; however, the Supreme Court has also stated that a cable operator cannot exercise editorial rights over PEG access programming that is patently offensive or indecent. *Denver Ed.* at 2382-90, 2394-97. BellSouth submits that MVPDs should not be responsible for captioning adult and other types of programs that deal with controversial social topics. As discussed above, that function necessarily implicates the editorial control and judgment inherent in the captioning process and therefore is best performed by the program owner.

¹¹*See* 47 U.S.C. Sections 534(b)(1)-(3)(A). It also does not appear that the Commission has given full consideration to the copyright implications of imposing captioning responsibilities on MVPDs. For instance, subject to limited exceptions pertaining to advertising, a cable operator will be liable for copyright infringement if it willfully alters the content of any program carried on a television broadcast signal through "changes, deletions or additions." 17 U.S.C. § 111(c)(3). Also, a number of BellSouth's contracts with cable networks preclude BellSouth from tampering with programming content in any respect. Given the substantial statutory penalties for copyright infringement, BellSouth submits that the Commission must not adopt any captioning rules that put MVPDs at any risk of violating federal copyright law.

basis from local educators.¹² Under the Commission's Rules, a substantial number of programming hours on leased ITFS channels *must* be reserved for educational programming, captioned or not.¹³ As a public service, wireless cable operators often transmit this programming not only to ITFS receive sites but into subscriber residences as well. However, since ITFS programming often is not captioned at the source, under the Commission's proposal many wireless cable systems will be required to block subscribers from receiving ITFS programming in order to avoid a violation of the Commission's Rules.

Furthermore, imposing the captioning obligation on every MVPD in the United States is an extremely expensive and ultimately unworkable solution when compared to the current practice of having the programming captioned *once* by the program owner at the source and distributed to MVPDs with the captions already in place. As noted by the Commission in its recent Report to Congress on closed captioning, the cost of "off-line" captioning for prerecorded

¹²The critical relationship between wireless cable operators and ITFS licensees has been well documented in other Commission proceedings. *See, e.g., In re: Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994) ["We believe that our endorsement of [ITFS] channel loading will . . . [allow ITFS licensees] flexibility to cultivate their partnerships with wireless cable operators, an arrangement we have sought to nurture over the last decade, to the welfare of the ITFS service and the public In today's market environment, MMDS channels and ITFS channels are interrelated components of an integrated set of channels used to provide non-broadcast instructional and entertainment programming in a given market."].

¹³*See* 47 C.F.R. § 74.931 (a)(1) (subject to limited exceptions, ITFS channels must be used to transmit formal educational programming offered for credit to enrolled students of accredited schools) and § 74.931(e)(2) (where an ITFS licensee leases capacity to a wireless cable operator, it must provide at least 20 hours of ITFS programming per channel each week, and must reserve an additional 20 hours per channel per week for recapture on one year's advance notice).

programming ranges from \$800 to \$2500 per hour;¹⁴ for live programming, the cost ranges from \$150 to \$1200 per hour.¹⁵ Even in an analog environment, it will be extraordinarily difficult and expensive for an MVPD to (1) monitor every program on every channel every single day to determine whether the Commission's captioning benchmarks have been satisfied, (2) identify whether any non-captioned programming is exempt from the Commission's captioning rules; and (3) where the programming is not eligible for an exemption, supply any required closed captioning that meets all current standards vis-a-vis accuracy, punctuation, etc. These tasks will become exponentially more difficult and expensive upon the transition from analog to digital compression technology.¹⁶ There is little question that requiring every cable and wireless cable

¹⁴NBC has estimated that it costs between \$900 and \$1800 per episode to caption a single episode of a prime time series, \$1800 for a "made for television" movie or episode of a miniseries, and \$1200 for a Saturday morning live action children's show. *In the Matter of Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, FCC 96-318 ["Report to Congress"]. ABC indicates that it pays approximately \$790 to \$1200 per hour for off-line captioning. *Id.* Furthermore, it is estimated that the cost of captioning a commercial is approximately \$250 per minute, and that off-line captioning of music videos costs \$275 to \$400 for a short form video and \$2500 for a long form 60-minute video. *Id.*

¹⁵The National Captioning Institute has stated that live captioning for a national program would cost between \$300 and \$1200 per program hour, and \$125 to \$300 for a local program hour. *Report to Congress* at ¶ 48.

¹⁶The largest cable operator in the United States, TCI, recently rolled out digital cable service in several markets and intends to do so in a total of 40 markets passing five million homes by the end of 1997. Mitchell, "TCI's Digital Express," *Cable World*, at 1 (February 10, 1997). Also, last year the Commission released its long-awaited *Declaratory Ruling and Order* in which it established interim rules and policies that will allow wireless cable systems to deploy digital compression technology. *Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, Declaratory Ruling and Order, FCC 96-304, DA 95-1854 (rel. July 10, 1996). BellSouth, among others, has

operator in the United States to incur duplicative equipment, labor and administrative costs to ensure the provision of closed captioning for potentially thousands of programs over 100 or more digitally compressed channels would tend to discourage private investment in digital facilities and cause exactly the type of unreasonable financial burden that Congress sought to avoid in enacting the closed captioning provisions of the 1996 Act.¹⁷

The Commission also fails to recognize that imposing the captioning obligation on MVPDs will not increase the availability or enhance the accuracy of closed captioning generally. Once closed captions are inserted at the production stage of a program, they can be used repeatedly by multiple distributors at any time in the future.¹⁸ By contrast, MVPDs can only

announced plans to launch digital wireless cable systems in 1997. *See, e.g.,* Gibbons, "PCTV's Story: Waiting for Digital," *Multichannel News*, at 54 (Dec. 9, 1996); Barthold, "A Foggy Road Ahead," *Cable World*, at 21 (Jan. 27, 1997); Barthold, "Going Digital," *Cable World*, at 22 (Jan. 27, 1997); Breznick, "BellSouth Eyes Atlanta, New Orleans, Miami for '98 MMDS launches," *Cable World*, at 12 (Dec. 2, 1996).

¹⁷The Commission appears to assume that the financial burden on MVPDs will nonetheless be minimized, on the theory that "[P]roducers generally will have the responsibility for captioning programming regardless of who has the obligation to comply with our rules." *NPRM* at ¶ 6. To the contrary, it is at least equally plausible to assume that vertically integrated cable programmers, knowing that they have no obligation to caption their self-produced programming, will force alternative MVPDs such as cable overbuilders and wireless cable operators to choose between either captioning the programming themselves, carrying the programming without captions in violation of the Commission's Rules or not carrying the programming at all. As discussed *supra*, this is not a realistic option for wireless cable operators who must offer channel lineups competitive with those of incumbent wired cable systems.

¹⁸The importance of the "reuse" factor should not be overlooked. For instance, the Commission has noted that certain high budget programming, such as theatrical films, is distributed nationally and reused many times. *Report to Congress* at ¶ 16. By focusing on distributors rather than producers, the Commission is forced into the impossible task of determining which distributor

caption broadcast and cable network programming as it is being received from the broadcast or cable network feed, *i.e.*, in "real time." This means that the captions are not encoded into the programming itself and thus cannot be reused by future distributors. Furthermore, the Commission already acknowledges that "real time" captioning is more prone to human error and thus is potentially less accurate than providing captions at the production stage of a program.¹⁹

Further, the Commission's proposal to establish periodic closed captioning "benchmarks" is untenable for MVPDs insofar as the Commission assumes that channel capacity will always remain the same for the entire eight or ten-year transition period proposed in the *NPRM*. Specifically, the Commission proposes a transition schedule which would require, for example, that 25% of all non-exempt programming be captioned after two years, 50% after four years, 75% after six years and 100% after eight years.²⁰ It is entirely possible, however, that shortly before the end of the first two-year period a number of cable and wireless cable systems will increase their channel capacity to over 100 digitally compressed channels. Yet the Commission's implementation schedule would require these operators to offer many more channels of closed captioned programming immediately upon conversion to digital, irrespective of whether such

in a potentially infinite chain of distribution and redistribution should be the single entity responsible for captioning programming for the benefit of all future distributors. BellSouth submits that this provides additional justification for the Commission to adopt the more practical solution of requiring captioning to be inserted at the source by the program producer before it enters the distribution chain.

¹⁹See *Report to Congress* at ¶ 14.

²⁰*NPRM* at ¶ 41.

programming is actually available in the marketplace. As already recognized by the Commission, marketplace factors such as advertising revenues and availability of captioning sponsorships determine when video programming is captioned.²¹ Since those factors have nothing whatsoever to do with the channel capacity of cable and wireless cable systems, it makes little public policy sense to saddle MVPDs with extensive and costly closed captioning obligations simply because they have increased their channel capacity to better serve their customers.²²

Hence, for the reasons set forth above, BellSouth urges the Commission to require that program owners, not MVPDs, be responsible for compliance with the Commission's closed captioning rules. BellSouth submits that Congress's explicit application of the statute to "owners," combined with its acknowledgment that it is more efficient and economical to caption programming at the time of production and distribute that programming with the captioning in place, is more than sufficient to give the Commission the authority to assert jurisdiction over program owners under the closed captioning provisions of the 1996 Act. BellSouth further submits that this approach is consistent with how captioned programming has always been made available through multichannel technologies for a number of years, and remains the most

²¹*Id.* at ¶ 42.

²²The Commission's proposed application of its "phase-in" schedule to MVPDs also raises the question of how an MVPD can be expected to sensibly respond to a closed captioning complaint that is filed during the middle of one of the "phase-in" periods. For instance, under the eight-year timetable proposed by the Commission, MVPDs would be required to ensure that 25% of their programming is captioned after two years. It is not clear, however, what percentage applies where a subscriber complaint is filed during year one, for which there is no specific captioning benchmark.

effective and cost efficient way to achieve maximum availability of captioned programming in the marketplace.

Finally, an owner-based regulatory framework is the most sensible way to achieve effective enforcement of the Commission's closed captioning rules. The true level of captioned programming in the marketplace will be far easier to evaluate if the captioning quota is expressed as a percentage of the total amount of programs produced rather than as a percentage of MVPD channel capacity, which is different from system to system and usually changes over a period of time. In addition, Congress has authorized the Commission to issue individual exemptions from its closed captioning rules for individual programs on a case by case basis.²³ Clearly, program owners will be more familiar with the technical, creative and economic factors that might justify an exemption in any given case, and thus are better positioned than MVPDs to assist the Commission effectively during the exemption process.

III. THE COMMISSION SHOULD EXCLUDE ITFS LICENSEES FROM THE DEFINITION OF "VIDEO PROGRAMMING PROVIDER" AND ADOPT A BLANKET EXEMPTION FROM ITS CLOSED CAPTIONING RULES FOR ITFS PROGRAMMING TRANSMITTED INTO SUBSCRIBER HOMES.

BellSouth fully supports the proposal of The Wireless Cable Association International, Inc. ("WCA") to (1) exclude ITFS licensees from the Commission's definition of "video programming provider" and (2) include a blanket exemption for ITFS programming transmitted into subscriber homes by wireless cable operators. For the reasons set forth in WCA's initial

²³47 U.S.C. § 613(d)(3).

comments on the *NPRM*, such an exemption is appropriate given the nature of ITFS technology, the limited financial capabilities of ITFS licensees, the local as opposed to national distribution of ITFS programming and the critical role that wireless cable operators play in supporting the ITFS service generally.²⁴

IV. THE COMMISSION SHOULD ADOPT A PUBLIC ACCESS EXEMPTION FOR ALL PROGRAMMING OFFERED ON PUBLIC, EDUCATIONAL OR GOVERNMENT ACCESS CHANNELS.

BellSouth supports the adoption of a blanket closed captioning exemption for PEG access programming. Under the 1984 Cable Act, a local franchising authority may and usually does require a cable operator to set aside channels for public, educational or governmental ("PEG") access use.²⁵ PEG programming largely consists of independently produced, non-profit community based programs provided by local citizens.. The Commission is correct in observing that PEG access channel programming typically operates on a relatively small production budget,

²⁴BellSouth further submits that the absence of a blanket ITFS exemption would be particularly burdensome for wireless cable systems who have yet to launch service. A wireless cable system simply cannot expect to launch a competitive multichannel offering in a timely manner if the Commission's Rules in any way disrupt the critical relationship between the wireless cable operator and local ITFS licensees whose channels are essential to the wireless cable system's success. Accordingly, BellSouth urges the Commission to consider the potential effect of its closed captioning rules on multichannel competition generally and on competition between cable and wireless cable systems specifically.

²⁵47 U.S.C. § 531(b). Subject to limited exceptions, a cable operator may not exercise any editorial control over PEG channels. 47 U.S.C. § 531(e).

and that imposing a captioning requirement on PEG channels may place an economic burden on producers of PEG access programming.²⁶

However, given the number and variety of PEG access programs and the Commission's limited administrative resources, BellSouth submits that it would not be practical for the Commission to carve out certain categories of PEG programming and enforce its captioning rules with respect to those PEG access programs only. Irrespective of its content, virtually all PEG access programs share the two fundamental characteristics that justify an exemption from the Commission's closed captioning rules, *i.e.*, small production budgets and limited viewership. Moreover, PEG access channels are entirely a product of negotiation between local franchising authorities and cable operators. Since local franchising authorities are best positioned to determine the PEG access needs of their respective communities, they are similarly well positioned to determine whether it is necessary to caption particular types of PEG access programming. Accordingly, any captioning requirements for PEG access programming are best left to private negotiation between LFAs and cable operators on a case-by-case basis.²⁷

²⁶NPRM at ¶ 74; *see also Report to Congress* at ¶ 54.

²⁷BellSouth submits that this proposal will prove to be far more efficient than having large numbers of PEG access producers besiege the Commission with individual requests for exemptions from the Commission's closed captioning rules.

V. IT IS NOT NECESSARY TO IMPOSE ANY RECORD KEEPING REQUIREMENTS ON MVPDS TO ENSURE COMPLIANCE WITH THE COMMISSION'S CLOSED CAPTIONING RULES.

BellSouth believes that effective enforcement of the Commission's closed captioning rules does not require MVPDs to maintain a public or other immediately available file that includes information as to how much of the programming on the distributor's system is captioned. Cable and wireless cable operators are already subject to substantial public file and reporting obligations under the Commission's Rules.²⁸ Requiring these entities to incur the additional cost of retaining captioning records for potentially thousands of programs over hundreds of channels is excessively burdensome and duplicative, given that program owners will already have this information readily available.

VI. THE COMMISSION'S EXISTING TECHNICAL STANDARDS FOR CLOSED CAPTIONING ARE SUFFICIENT TO ENSURE COMPLIANCE WITH THE PROPOSED CLOSED CAPTIONING RULES.

BellSouth fully agrees with the Commission's conclusion that "[c]urrent technology is sufficient to ensure that every video programming provider is capable of transmitting the captioning included with the programming to consumers."²⁹ Thus, it is unnecessary for the Commission to do anything more than simply require all MVPDs to deliver captioned

²⁸See 47 C.F.R. §§ 76.77, 76.79, 76.207, 76.221, 76.305, 76.400, 76.403, 76.615, 21.911 and 74.996.

²⁹NPRM at ¶ 110.

programming intact to their subscribers.³⁰ BellSouth also agrees with the Commission's tentative conclusion that it should not at this time adopt any standards pertaining to the non-technical aspects of quality and accuracy of closed captions.³¹ This is a matter best resolved between program owners and representatives of the hearing-impaired community, and not by regulation of MVPDs who have no role in the captioning process itself.

VII. THE COMMISSION SHOULD DECLARE THAT PROGRAMMERS ARE REQUIRED TO MAKE CAPTIONED PROGRAMMING AVAILABLE TO ALL MVPDS ON A NONDISCRIMINATORY BASIS.

BellSouth submits that the Commission must prevent programmers from using the "captioning card" as a means of impeding a cable overbuilder's or a wireless cable operator's access to cable programming. It is conceivable, for example, that a programmer might attempt to obtain both a regulatory and a marketplace advantage by refusing to sell its programming with captions to MVPDs who compete directly with incumbent cable operators. The Commission should therefore clarify that if programmers make closed captioned programming available to incumbent cable operators, they must do the same for all MVPDs on a nondiscriminatory basis.

Finally, the Commission should also clarify that television stations carried by MVPDs pursuant to retransmission consent must also make their captioned programming available to all such distributors on a nondiscriminatory basis. The legislative history of the 1996 Act indicates that an MVPD may not refuse to carry a "consent" signal solely because the programming on that

³⁰See, e.g., 47 C.F.R. § 76.606.

³¹NPRM at ¶ 110.

signal is not captioned as required by the Commission's Rules.³² While BellSouth has no objection to this requirement, it highlights the need for the Commission to confirm that a television broadcast station carried on a "consent" basis must make its captioned programming available to all MVPDs on the same terms and conditions.

VIII. CONCLUSION.

On the most important issue before the Commission in this proceeding, Congress has provided clear guidance: it is much more practical and efficient to caption programming during the production stage than at the MVPD's facilities just prior to delivery of the programming to subscribers. BellSouth therefore submits that it would be most sensible for the Commission to construct its closed captioning rules around this basic concept and adopt closed captioning rules that (1) impose responsibility for compliance with its closed captioning rules on program owners, (2) exclude ITFS licensees from its definition of "video programming provider" and establish a blanket closed captioning exemption for ITFS programming delivered into subscriber homes by wireless cable operators; (3) establish a blanket exemption for PEG access programming; (4) impose no additional record keeping requirements on MVPDs; (5) include no technical or non-technical standards for closed captioning other than the requirement that all closed captioned

³²House Report at 115.

closed captioned programming be retransmitted intact; and (6) declare that captioned programming must be made available to all MVPDs on a nondiscriminatory basis.

Respectfully submitted,

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